



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 12-07928
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Matthew J. Baker, Esq.

09/17/2013

Decision

Harvey, Mark, Administrative Judge:

In August 2007, Applicant was granted a Top Secret security clearance. She possessed and used illegal drugs from about December 2002 until October 2011. More time without illegal drug use is necessary to fully mitigate drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 8, 2006, and February 3, 2012, Applicant submitted Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1, 2) On May 17, 2013, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline H (drug involvement). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant, deny, continue, or revoke a security clearance for Applicant, and it recommended that her case be submitted to an

administrative judge for a determination whether her clearance should be denied, granted, continued, or revoked. (HE 2)

On June 12, 2013, Applicant responded to the SOR. (HE 3) On July 18, 2013, Department Counsel was ready to proceed on Applicant's case. On July 25, 2013, DOHA assigned Applicant's case to me. On August 22, 2013, DOHA issued a hearing notice, setting the hearing for September 5, 2013. (HE 1) Applicant's hearing was held as scheduled, using video teleconference. At the hearing, Department Counsel offered four exhibits, and Applicant did not offer any exhibits. (Tr. 7-8, 14; GE 1-4) There were no objections, and I admitted GE 1-4. (Tr. 14-15) On September 10, 2013, I received the transcript of the hearing.

Findings of Fact¹

Applicant's SOR response admitted all of the SOR allegations, and she provided some extenuating and mitigating information. (HE 3) Her admissions are accepted as factual findings.

Applicant is a 29-year-old senior analyst and customer support manager for a software project, who has worked for the same defense contractor for seven and a half years. (Tr. 17-18; GE 1, 2) Her employer has never taken any adverse actions against her. (Tr. 20) Her most recent promotion to senior analyst was in 2010. (Tr. 21) In 2002, she was the valedictorian for her high school class of 540 students. (Tr. 30-31; SOR response) In May 2006, Applicant graduated from college with a bachelor of science degree with a major in mathematics. (Tr. 23; SOR response) She has never been married, and she does not have any children. (Tr. 39) She is currently pregnant and expecting a baby in November 2013. (Tr. 40; SOR response) She has never served in the military. (Tr. 39)

Drug Involvement

In her September 9, 2006 SF 86, Applicant disclosed her marijuana use (40 times from December 2002 to June 2006) and one use of mushrooms in 2005. (GE 2) She disclosed her drug use in her 2006 follow-up Office of Personnel Management (OPM) personal subject interview (PSI). (Tr. 45)

In her January 14, 2012 SF 86, Applicant disclosed her marijuana use (occasionally from December 2002 to October 2011) and one use of mushrooms. (GE 1) She indicated her marijuana use was while holding a security clearance. (GE 1) She disclosed her drug use in her March 15, 2012 follow-up OPM PSI. (GE 3)

Applicant admitted that she possessed and used marijuana from about December 2002 until October 2011. (Tr. 24-25; SOR response to ¶ 1.a) She used marijuana after she was granted a Top Secret security clearance in August 2007. (SOR

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

response to ¶ 1.b) She used marijuana in college and continued to do so after graduating in social settings. (Tr. 23) Her marijuana use did not affect her employment or jeopardize national security. (Tr. 26-27) Her marijuana use violated her employer's policies. (Tr. 37) Her employer has not subjected her to random urinalysis-drug testing. (Tr. 37)

Applicant stopped using illegal drugs because it was inconsistent with her lifestyle. (Tr. 25) She was taking care of a foster child. (Tr. 25) She is courteous with her drug-using friends, but does not socialize or associate with them. (Tr. 39) She has never been arrested, charged, or convicted of a drug-related offense or any other offense. (Tr. 24; GE 1) She promised that she would not resume using illegal drugs. (Tr. 26)

Character Evidence

Applicant volunteers in Haiti and her local community for the Salvation Army, Head Start, the Jaycees, her church, and numerous other civic programs. (Tr. 27-32; SOR response) She is an honest, caring, intelligent, dedicated, and responsible person. (Tr. 27-35; SOR response) She disclosed her marijuana use to her family and supervisors. (Tr. 36) Her supervisors are very supportive of her continued employment. (Tr. 34)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Three drug involvement disqualifying conditions in AG ¶¶ 25(a), 25(c), and 25(g) could raise a security concern and may be disqualifying in this case: “any drug abuse,” “illegal drug possession,” and “(g) any illegal drug use after being granted a security

²AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

clearance.” These three disqualifying conditions apply because Applicant possessed and used marijuana occasionally from December 2002 to October 2011.³ She used marijuana after being granted a Top Secret security clearance in August 2007. She admitted her marijuana possession and use while holding a security clearance to OPM investigators, in her 2012 SF 86, her SOR response, and at her hearing.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4,

³AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). The illegal drugs Applicant possessed and used are listed on various schedules of Section 812(c) of Title 21.

2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."⁴ The passage of time after ending marijuana use is not considered in isolation. Marijuana use after completing her 2006 SF 86, being interviewed about her drug use by an OPM investigator, and while holding a Top Secret clearance, is more significant in this case. See ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) (marijuana use after completing an SF 86 "undercuts" favorable application of the drug involvement recency mitigating condition).

Applicant acknowledged that she possessed and used marijuana on an occasional basis for almost nine years (December 2002 to October 2011). She recognized the adverse impact on her life of drug abuse in connection with access to classified information. I accept Applicant's statements in her SF 86s, to the OPM investigators, in her SOR response, and at her hearing as credible, and she intends to abstain from future drug possession and use. AG ¶ 26(a) applies in part to her illegal-drug-related conduct because it is not particularly recent. However, use of illegal drugs while holding a security clearance shows a profound lack of judgment, and more time

⁴ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge's decision to revoke an applicant's security clearance after considering the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

See *also* ISCR Case No. 02-10454 (App. Bd. Nov. 23, 2004) (sustaining denial of security clearance for Applicant who used marijuana five times while holding a security clearance with four years between most recent marijuana use and hearing).

without drug use is necessary to assure that future drug use is unlikely to recur and does not cast doubt on her current reliability, trustworthiness, or good judgment.⁵

Applicant demonstrated her intent not to abuse illegal drugs in the future. She has not used illegal drugs since October 2011; she has disassociated from drug-using associates and contacts; and she has avoided the environment where drugs were used. AG ¶ 26(b) partially applies.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. Marijuana was never lawfully prescribed for her under federal law. She did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, and a favorable prognosis by a duly qualified medical professional.

In conclusion, Applicant possessed and used marijuana on multiple occasions while in college. She continued to use marijuana until October 2011. The motivations to stop using illegal drugs are evident. She understands the adverse consequences from illegal drugs.⁶ Absent her marijuana use while holding a security clearance, drug involvement concerns would be mitigated. More time must elapse without marijuana use to demonstrate a sufficient track record of no drug abuse to eliminate drug involvement as a bar to her access to classified information.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful

⁵In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

⁶Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

The factors supporting reinstatement of Applicant's clearance are significant; however, they do not warrant reinstatement of her security clearance. She was forthright and candid in her SF 86s, her OPM interviews, her responses to DOHA interrogatories, her SOR response, and at her hearing about her marijuana use. She is 29 years old, and she has the maturity and trustworthiness to conscientiously comply with security requirements. She achieved some important employment goals, demonstrating her self-discipline, responsibility and dedication. She served successfully as an employee of a defense contractor for seven and a half years. Her supervisors laud her contributions to the defense contractor and have promoted her. She volunteers in Haiti and her local community for her church and numerous civic programs. She is an honest, caring, diligent, intelligent, and responsible person. She disclosed her marijuana use to her family and supervisors. Her supervisors are very supportive of her continued employment. She has held a security clearance since 2007, and there is no evidence of any security violations. Applicant understands why her marijuana possession and use were improper, and she intends not to use illegal drugs in the future. She demonstrated her loyalty, patriotism, and trustworthiness through her service and contributions to the Department of Defense as a contractor.

The rationale for revoking Applicant's clearance is more substantial. Her occasional marijuana possession and use after completing her 2006 SF 86 and her 2006 OPM PSI, and while holding a security clearance were imprudent, irresponsible, reckless, and improper. She did not complete a drug rehabilitation or counseling program. She has refrained from marijuana use for only two years. Her marijuana use "raises questions about [her] ability or willingness to comply with laws, rules, and regulations." AG ¶ 24. More time without marijuana use is necessary to credit her with being fully rehabilitated and to entrust her with access to classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement concerns are not mitigated. For the reasons stated, she is not eligible for access to classified information at this time.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge